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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PACIFIC RANCH HOMEOWNERS ASSOCIATION,

Plaintiff and Respondent,

v.

ELMER MURRY, JR.,

Defendant and Appellant.

G039899

(Super. Ct. No. 06CC05430)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Brewer & Brewer and Templeton Briggs for Defendant and Appellant.

Blackmar, Principe & Schmelter, Gerry C. Schmelter and Chantelle M. Fisher; Law Offices of Richard A. Tinnelly and Bruce R. Kermott for Plaintiff and Respondent.

Elmer Murry, Jr., appeals from a permanent injunction that directed him to remove a hot tub from the patio of his condominium unit, after the trial court found Pacific Ranch Homeowners Association (Association) had acted reasonably and in good faith when it voted to ban hot tubs on patios. Murry argues he was improperly denied a jury trial, the Association acted unreasonably, and the evidence was insufficient to warrant an injunction. We disagree and affirm.

FACTS

In 1999, Murry purchased a condominium unit in Pacific Ranch, located in Huntington Beach.[1] He noticed a neighbor had a hot tub on his patio, and after finding the nearest of the Association's three spas frequently out of service, Murry installed his own. Made of wood, it is 7 feet wide by 7 feet long, and 3 feet high. Murry applied for a building permit from Huntington Beach. An inspector visited his unit, looked over the installation, and requested modifications, but no permit was ever issued.

The Association learned of Murry's hot tub in August 2003. It immediately sent Murry a letter advising the addition was a modification to his patio that required approval by the architectural committee. It asked him to submit an application for the modification. Murry did not respond. A second notice was sent in January 2004, and it too passed without a response. Murry later claimed he never received either letter.

In March 2004, a couple (the Fishbeins) submitted an application to install a hot tub on their patio. The architectural committee turned them down, explaining in its minutes "[w]e referred them to CC&R Article XI, Section 4. The Association would not have the ability to monitor noise nuisance, there is too close a proximity to neighbors, and the Association provides 3 spas for homeowner use." The cited section of the covenants, conditions, and restrictions (CC&R's) provides "[nothing] shall be . . . done

[1] We consider the facts most favorable to the judgment, under the rule that a judgment of a lower court is presumed correct and all inferences and presumptions necessary to support it must be made. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

. . . which may be, or may become, an annoyance or nuisance to the neighborhood, or which shall in any way interfere with the quiet enjoyment of each of the [o]wners of his respective condominium unit . . . ."

The issue of hot tubs came up at an April 20, 2004 meeting of the Association's board of directors (board), which regularly reviewed the architectural committee minutes. Both shared one member in common, Vicki Lucas (chairperson of the architectural committee). According to Lucas, "after I explained our rationale as [an architectural] committee, the board discussed it and . . . [took] a formal vote to not allow freestanding Jacuzzis."[2] Minutes of the Association meeting confirm the vote. Lucas said the board was concerned about the possibility of noise, which "depended on who is using those personal Jacuzzis," and they felt the CC& R's prohibited personal hot tubs. Another board member (Frank Pickett) testified there were three reasons for the vote – concerns for noise, esthetics, and safety. He said the Association had received complaints about noise from a community hot tub near Murry's unit, and they believed the same problem could arise from a private one. Also present was Robert Spencer, the property manager. Spencer recalled the board had discussed noise issues, esthetics, and possible damage to common areas if a hot tub leaked.

It appears Murry was present at the board meeting on April 20, 2004. Lucas said the board spoke with Murry at a meeting where "we told him our concerns for the Jacuzzi. This was an opportunity for him to present his side of it. And he asked if he could submit an application to the architectural request, and we told him yes." Since Murry subsequently submitted an application to the architectural committee on June 1,

[2] Although the Association voted to ban Jacuzzis, there is no indicator it meant only that brand of hot tub. Rather, the term "Jacuzzi "appears to have been used by both the Association and the parties generically to refer to a hot tub. "Jacuzzi," like "Coke" and "Kleenex" appears to be a word that has taken on a generic connotation. With that understanding, we shall use the term "hot tub" to refer to the subject of the instant dispute.

2004, and there is no evidence of any board meetings in the interim, we must assume Lucas meant Murry attended the April 20, 2004 meeting.[3]

Meanwhile, in May 2004, another couple (the Daffers) met with the architectural committee to ask if they needed to submit an application to install their own hot tub. Lucas said the committee told them "we felt there [was] a noise nuisance problem . . . there [was] not a way to monitor that . . . [and] the board had . . . disapproved . . . of installing freestanding Jacuzzis." The Daffers decided not to apply.

On June 1, 2004, Murry submitted a written application for permission to install a hot tub. It was denied by the architectural committee on June 9, 2004. In the space provided on the application form for a decision, the committee said "Board took action to disapprove freestanding Jacuzzis. Architectural committee has disapproved [two] other requests." The Association wrote to Murry on June 16, 2004, telling him the application had been denied and he had to remove the hot tub within 30 days.

On August 12, 2004, the Association sent Murry a "notice of hearing," advising him the board would hold a hearing regarding his failure to remove the hot tub at its regular meeting on September 21, 2004. Murry signed and returned a form stating he would appear for the hearing.

The only account of the September 21, 2004 board hearing comes from Murry. When the regular board meeting ended, a gentleman he did not recognize asked who he was. Murry identified himself and said he was there for a hearing. The gentleman said "what are you talking about? How come the Jacuzzi is still there?" Murry replied he thought he was there to discuss the issue. The individual said "No, get rid of it. It should have already been gone . . . you are wasting my time," and walked out.

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[3] Murry claimed he first learned there was a problem with his hot tub after the April 20, 2004 board decision, when the Association property manager (Robert Spencer) called to tell him he had to submit an architectural application for the hot tub. This implies Murry did not appear before the board at the April 20, 2004 meeting, although he never addresses the point specifically. But we are bound by the facts favorable to the judgment, so we must credit Lucas' recollection of events over Murry's.

Lucas asked Murry if he had read the CC&R's thoroughly when he bought his unit. He said he had. Lucas told him in that case, he should have known hot tubs were not allowed. Murry brought along copies of a letter from his doctor saying he needed to use a hot tub for back therapy, and handed one to each of the remaining board members. He said his use of the hot tub was not disturbing anyone. Robert Spencer, the property manager, said the hearing was over and he and the board members left. Murry never acceded to the Associations' demand that he remove the hot tub, and the instant action followed.

The complaint alleged Murry failed to comply with the Pacific Ranch CC&R's by installing a hot tub without the required approval of the Association's architectural committee. Causes of action were set out for breach of the CC&R's, injunction, nuisance, trespass, and declaratory relief (that Murry had breached the CC&R's). The second cause of action, for an injunction, incorporated and realleged the allegations of the first cause of action for breach of the CC&R's. Prior to trial, the Association dismissed its causes of action for breach of the CC&R's, nuisance, and trespass, leaving only its injunction and declaratory relief claims.

The case was tried by the court after it denied Murry's request for a jury trial. The court ruled the claim for an injunction to enforce the CC&R's was equitable, so there was no right to a jury, and the declaratory relief claim was duplicative since it sought the same relief. The evidence presented was as set out above. The court found the Association acted reasonably and in good faith in requiring Murry to remove his hot tub. It entered a mandatory injunction directing Murry to remove the hot tub within 30 days, and awarded the Association its attorney fees and costs.

I

Murry argues he was entitled to a jury trial because breach of contract is a legal issue. He is mistaken.

Where the only relief sought is equitable, as here, there is no right to a jury. "'"A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law."' [Citation.] On the other hand, if the action is essentially one in equity and the relief sought 'depends upon the application of equitable doctrines,' the parties are not entitled to a jury trial. [Citations.]" (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 9.) An action for injunctive relief is one historically heard in equity, not at law, and such matters are tried without a jury. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 846 ["An action seeking specific performance and/or injunctive relief (to enforce a settlement agreement) is, of course, equitable in nature."]; see also *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1240 -1242 [no error to deny jury demand in case with one legal claim (damages for fraud) and multiple equitable claims (including injunctive relief), since equitable claims may be tried first and in this case that decision disposed of legal claim].) Since the only cause of action tried was the Association's claim for injunctive relief to redress breach of the CC&R's, Murry was not entitled to have the matter heard by a jury.

In a related point, Murry contends he was effectively denied a jury trial when the court allowed the injunction claim to proceed. The argument goes like this. After the Association dismissed the breach of contract claim, there was no cause of action left to support an injunction, so the request for that remedy should have been dismissed. But that overlooks both the facts and the law.

The injunction cause of action realleged the allegations of the cause of action for breach of the CC&R's, so there was a claim underlying the requested remedy. Nor was anything improper in the Association's dismissing its legal claims in order to avoid a jury trial. It has long been settled that a party may *obtain* a jury trial by abandoning equitable claims (*Raedeke v.Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671- 672), and we see nothing amiss in dismissing legal claims to insure a court

trial. There was no error in proceeding on the claim for an injunction to compel compliance with the CC&R's, or in trying that claim by the court.

II

Murry argues the Association had the burden or proving it acted reasonably, and there is insufficient evidence to show that it did so. We disagree on both points.

Murry had the burden of proof on reasonableness. Use restrictions contained in CC&R's are presumed reasonable, and a party challenging a use restriction must prove otherwise. (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 380 [prohibition against pets enforceable].) The same rule applies to an association decision interpreting CC&R's, or exercising powers granted in governing documents. As a leading case explained, "the Board's decision here to use secondary, rather than primary, treatment in addressing the Development's termite problem, a matter entrusted to its discretion under the Declaration and Civil Code section 1364, falls within *Nahrstedt's* pronouncement that 'Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy.' [Citation.]" (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 264-265.) So Murry had to establish the Association's decision was unreasonable in order to prevail.

Murry relies on *Dolan-King v. Rancho Santa Fe Assn*. (2000) 81 Cal.App.4th 965 for the proposition the burden was on the Association to show its decision was reasonable. But the case is distinguishable. There, an association adopted "guidelines" to supplement its recorded restrictions, and it was stipulated the recorded restrictions controlled over the guidelines. (*Id*. at p. 972, fn. 2.) The court observed the guidelines were not entitled to the same judicial deference as recorded restrictions

enforceable as equitable servitudes. The instant case does not involve a subsequently adopted, unrecorded, advisory guideline, so *Dolan-King* is inapt. The rule applicable here is that the CC&R's are presumed reasonable until shown otherwise by Murry.

On the evidentiary question, the record reveals substantial evidence to support the decision the Association acted reasonably. The CC&R's provide that patios attached to certain units are part of the common area, even though set aside for the sole use of the unit they serve. The Association is given the power to establish uniform rules and regulations for the use of common areas. (Article VI, section 5 (c).) Approval by the architectural committee is required for "additions to, or changes of, the patios . . . which would be visible from the exterior thereof or which would require a building permit," among other things. (Article IX, section 1.) Various use restrictions are set out. They include prohibiting unit owners from doing anything "which may be, or may become, an annoyance or nuisance to the neighborhood." (Article XI, section 4.) The only provision dealing specifically with patios provides: "Patios . . . shall not be used for permanent storage of articles or equipment . . . other than patio furniture, portable barbeques, and decorative items." (Article X, section 13.)

The Association's decision to bar personal hot tubs from patios must be upheld, since it is supported by a reasonable reading of the CC&R's. At the April 2004 board meeting, members expressed concerns about noise, among other things. There had been noise complaints about use of the community's hot tubs, and the board recognized the risk would be even greater from patio hot tubs in light of the close proximity of the units. Realizing the amount of noise would depend on the individual using a personal hot tub, the board decided not to subject owners to the vicissitudes of their neighbors' lifestyles, and it enacted a community-wide ban. That is something within the Association's authority under the CC&R's. Article XI, section 4, one of the use restrictions, prohibits a unit owner from doing anything that "may become . . . an annoyance or nuisance to the neighborhood." The language is very broad in proscribing

an activity that "may become" a nuisance, and it impliedly entrusts to the board the authority to make such calls. It cannot be said it was unreasonable for the board to fear that a spate of patio hot tubs would eventually lead to objections from neighbors.

Murry argues the Association's decision was unreasonable for several reasons. We consider – and reject – each in turn. Murry contends he was not given notice of the April 2004 board meeting, where hot tubs were banned, and the September 2004 hearing on the refusal to remove his was unfair. We disagree.

There is evidence Murry *attended* the April 2004 board meeting, which obviates the question of notice. Lucas testified Murry met with the board at a meeting where "we told him our concerns for the hot tub. This was an opportunity for him to present his side of it. And he asked if he could submit an architectural request, and we told him yes." Since Murry submitted an architectural application on June 1, 2004, and there is no evidence of an intervening board meeting, the inference is Murry was present at the April 2004 meeting. Although Murry contends the only time he met with the board was in September 2004, we are bound to consider the evidence favoring the judgment, so we must credit Lucas' recollection over Murry's. Since Murry was present at the critical board meeting, there was no notice problem.

Nor can we find any fatal flaw in the September 2004 hearing. The hearing was convened to consider Murry's failure to remove the hot tub after several requests from the Association. Murry presented a letter from a doctor saying he needed a hot tub for back therapy, and he told the board his hot tub was not disturbing anyone. While it appears the board was brusque and rude in dealing with Murry, and perhaps did not fully hear him out, we cannot say these shortcomings reached back to make the prior decision unreasonable. The reasonableness of the Association's decision does not turn on Murry's personal needs and behavior, but rather on weighing the benefit to the community of the hot tub restriction against the land use burden of the restriction. As a leading case explains, "the reasonableness or unreasonableness of a condominium

restriction . . . is to be determined *not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole. . . . [W]hen . . . a restriction is contained in the declaration of the common interest development and is recorded with the county recorder, the restriction is presumed to be reasonable and will be enforced uniformly against all residents . . . *unless* the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restriction's benefits to the development's residents, or violates a fundamental public policy." (*Nahrstedt v. Lakeside Village Condominium Assn., supra*, 8 Cal.4th at p. 386.) So the failure to allow Murry a fuller airing of his individual situation was harmless error, if any.

Murry next asserts the hot tub ban was invalid without a vote of the homeowners. He reasons there was no express prohibition in the CC & R's, so the Association's interpretation to that effect was a de facto amendment of the CC & R's that was not valid until approved by a majority of unit owners. (Civ. Code, § 1355.) Not so. The CC&R's prohibit any activity that may become a nuisance or annoyance to unit owners, and impliedly grant the Association power to decide whether a given activity rises to that level. It would be unreasonable to read this as requiring a vote of all homeowners each time a potential nuisance issue arises. It would make common interest living unworkable, and we decline to do so.

Finally, Murry argues the decision was unreasonable because the Association previously had allowed another homeowner to install a personal hot tub on his patio. But that overlooks the circumstances. It was stipulated the prior hot tub was approved in 1997, removed in 1999 when the unit was sold, and no others had been allowed since 1997. We cannot say it was unreasonable for the Association to change its policy on the issue over the course of seven years. By the time of the 2004 vote, there had been no personal hot tubs in Pacific Ranch for seven years. The decision was one of general application to all homeowners, so it cannot be said Murry was turned down while

others were approved. Common interest governance, like municipal governance, evolves over time and positions on issues change as the life of the community itself changes. The change of position alone does not make the 2004 decision unreasonable, and there has been no showing the Association acted unreasonably when it prohibited the installation of personal hot tubs on patios within Pacific Ranch.

III

Murry argues there was insufficient evidence to support an injunction. His theory is that no complaints had been made about the use of his hot tub, so there was no showing it was likely to become a nuisance. But that misapprehends the issue.

The injunction was issued to compel compliance with the prohibition against hot tubs on patios, not because Murry's was a threatened nuisance. The nuisance concern behind the Association decision was not that Murry was acting in an objectionable way. Rather, it was the risk posed if personal hot tubs were to be allowed, and proliferated, as seemed possible when three unit owners applied, or inquired about applying, for permission to install them in early 2004. In other words, it was not Murry's use of his hot tub, but his refusal to remove it, that warranted the injunction. The threatened harm was a unit owner's refusal to comply with an association decision regarding prohibited use of his unit. There was sufficient evidence to support the injunction.

Since Murry was not entitled to a jury trial in this action to enjoin a breach of the Association's CC&R's, and he has not shown the Association acted unreasonably

or the injunction is unsupported by the evidence, the judgment appealed from must be affirmed. Association is entitled to costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.